Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-696

J. EDWIN LA VALLEE, Superintendent,
Clinton Correctional Facility,

Petitioner,

against

UNITED STATES OF AMERICA, ex rel. THOMAS MUNGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, J. Edwin La Vallee, Superintendent of the Clinton Correctional Facility, Auburn, New York, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Thomas Mungo* v. *J. Edwin La Vallee.*

• By order No. A-340, this Court on October 15, 1975 extended time to file for Writ of Certiorari to and including November 12, 1975.

Statement of the Case

A. Facts.

On January 14, 1967 a police broadcast reported the theft of a United Parcel truck. Following a bulletin reporting recovery of the vehicle, officer Oborouski on motor patrol heard a broadcast which stated: Perpetrators escaped in 6Z7154 New York, blue, four door vehicle, '66 Plymouth.*

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* The radio messages broadcast were as follows:

9:38 a.m. January 14, 1967. From the 66th Precinct, Sergeant Caruso. Received by Patrolman Reilly. 68th Street and Fort Hamilton Parkway. See complainant re: possible larceny of truck. Sergeant Caruso requested car 66 G, which is unavailable and call was given 66D.

• • •

On the rear of the same slip, time stamped 9:56 a.m., January 14, 1967, 7416 United Parcel truck taken in front of 825-71st Street. Received from car 64G, designation 2053, at 10:34.

• • •

Time stamp 10:08 a.m., January 14, '67. From 66th Precinct, Sergeant Caruso. United Parcel truck, dark rocket, New York 145749 commercial. On the side truck number 7146, stolen from 68th Street and Fort Hamilton Parkway. Direction unknown. Transmitted by radio by operator number 37, Patrolman James McGovern.

• • •

10:10 a.m., January 14, '67. R.N.P. 64G. Recovered at 825-71st Street unoccupied.

• • •

10:13 a.m., January 14, 1967, from car 64A. Perpetrators escaped in 6 Z 7154 New York, blue, four door vehicle, '66 Plymouth. Received by Patrolman James McGovern, assigned to radio.

• • •

10:21 a.m., January 14, '67. Indication '66 Plymouth by operator number 27, Frank Mollo.

• • •

10:35 a.m., January 14, 1967. From R.M.P. 62, Sergeant number 2. Indicates 62B is also on scene. West 8th Street and Avenue U holding occupants at 6Z 7154. Received by operator number 37, Patrolman James McGovern.

• • •

At 10:35 a.m., January 14, '67; 66 detectives, 64 detectives notified. 10:53 a.m., January 14, '67, signal 10383.

Opinions Below

The decision of the Court of Appeals which petitioner seeks to review was a reversal dated July 15, 1975 of a memorandum-decision and order of the United States District Court for the Eastern District of New York dated March 20, 1974. The memorandum-decision and order of the District Court is reported at 372 F. Supp. 742.

The decision of the Court of Appeals is not yet reported. The decision of the Court of Appeals is reproduced on Appendix A and the memorandum-decision and order of the District Court is reproduced as Appendix B.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1). The decision of the Court of Appeals was handed down July 15, 1975.

Questions Presented

1. Whether the constitutional validity of the arrest, and a search-seizure of property within a motor vehicle occupied by the respondent should be raised by habeas corpus (28 U.S.C. 2254)?

2. Whether probable cause exists for an arrest, search-seizure through a stop of a motor vehicle by a police officer which matched a description furnished by a police radio communication having an anonymous source and concerning an episode that is unrelated to the offenses that resulted in the State convictions?

At the pretrial hearing the officer understood this alarm to mean that a high-jacking had taken place.*

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* The conclusion is inescapable that to the officer, a hijacking meant necessarily that guns were involved.

Minutes thereafter a blue Plymouth sedan bearing license plate number 6Z7514 with three male occupants was spotted, pursued and overtaken at a traffic light. A search of the persons and the vehicle was conducted. Underneath the driver's seat, occupied by respondent, a loaded revolver was found and under the seat on the passenger side a loaded automatic pistol was found. The occupants were placed under arrest and taken to the station house. A search of one of the passengers at the station house turned up keys which were identified by the victim as belonging to him which had been taken along with other proceeds from a prior robbery. Hats which had also been seized from the automobile were used to aid the victim of the robbery in making an identification of respondent and his passenger who had the keys.

The officer's testimony as to the radio messages was corroborated by an officer attached to the communications unit through radio logs which are gathered and secured in a locked room the very next day. The only one key is retained by the testifying officer.

The property seized was received in evidence over respondent's unsuccessful motion to suppress, and convictions followed after the separate jury trials. One trial involved gun charges stemming from the automobile search and seizure and the other involved the prior robbery solved through finding the keys on the passenger.

B. Post Conviction Proceedings in State Court.

On February 28, 1968, the respondent was sentenced after his conviction for robbery, grand larceny and assault. The conviction was affirmed by the Appellate Division, Second Department without opinion 34 A D 2d 736, leave to the Court of Appeals denied July 1, 1970. On March 5, 1968, respondent was sentenced on his conviction of illegal possession of two weapons, the revolver and an automatic pistol. This second conviction was affirmed in

the Appellate Division without opinion 34 A D 2d 616 and by the Court of Appeals without opinion 28 N Y 2d 540.*

C. Federal Petition for Habeas Corpus.

Respondent then filed a petition for a writ of habeas corpus in March, 1973 challenging both his convictions in Kings County claiming his arrest and the subsequent search of his vehicle were made without probable cause and in addition, as to the robbery conviction, the identification by the robbery victim was impermissively suggestive and the product of the use of property (hats) unlawfully seized. The United States District Court for the Eastern District of New York in an opinion, without a hearing, denied the petition. The United States Court of Appeals for the Second Circuit on August 16, 1974 denied respondent's certificate of probable cause. On February 4, 1974 a certificate of probable cause was granted following application to reconsider and vacate the prior denial for the certificate of probable cause.

D. Opinion of the District Court and opinion of the Court of Appeals reversing the District Court.

The District Court held that the record supported the state court's finding that the out-of-court identification was reliable on the basis of independent recognition free of the tainted confrontation. Probable cause for the arrest was founded on the observation that the arrest occurred within a short time of the report of the theft of the truck, upon a matching description of the get-a-way car, the description evidently supplied by a witness at the scene of the crime. The search was determined to be valid

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* The appellant was sentenced to concurrent terms of 15 to 20 years on the robbery count, 5 to 20 years on the larceny count and 2½ to 10 years on the assault count. He was sentenced for illegal possession of weapons to a term of 3 to 14 years, concurrent with the previously imposed sentence.

in the exigent circumstance of observing a car fitting the description requiring immediate action, relying for support on *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Warden* v. *Hayden,* 387 U.S. 294 (1967); and *United States* v. *Wabnick,* 444 F. 2d 203 (2d Cir. 1971). Probable cause for the search was furnished by the same circumstances justifying the arrest, and in the alternative, as incident to a lawful arrest, citing *Chambers* v. *Maroney* (*supra*).

In reversing, the Circuit Court of Appeals held that the arrest and search was without probable cause and hence reached no other issues.

The principal factual departure the Circuit Court of Appeals had with the District Court was the absence of the source that supplied the information radioed by the police to field units and lack of corroboration to establish that an actual theft had taken place. In concluding as they did, the Circuit Court of Appeals found no support in the record for the District Court's assertion that this report that the perpetrators were fleeing in a blue sedan bearing a given license plate number was evidently made by a witness at the scene of the crime.

Support for the Circuit Court of Appeals reversal rested on *Whitley* v. *Warden of Wyoming Penitentiary,* 401 U.S. 560 (1971).

Reasons Why Certiorari Should Be Granted

1. This Court should re-examine whether habeas corpus (28 U.S.C. 2254) should be available to review the constitutional validity of the arrest and subsequent search of respondent's automobile under the circumstances of this case.

The present rule is that Fourth Amendment claims, filed by state prisoners, are cognizable in federal habeas corpus proceedings, and the trial court's application of the

exclusionary rule must be examined as it would be on direct review (*Kaufman* v. *United States,* 394 U.S. 217 (1969)). Not bound by the state determination, the federal court will hold its own evidentiary hearings if the State Court's record is inadequate (*Townsend* v. *Sain,* 372 U.S. 293 (1963), *Fay* v. *Noia,* 372 U.S. 391 (1963)).

In *Kaufman* v. *United States, id.* at 225, this Court stated that the availability of federal habeas corpus to state prisoners was founded largely "as a recognition that the availability of collateral remedies is necessary to ensure the integrity of the proceedings at and before trial where constitutional rights are at stake."

Members of this Court in *Schneckloth* v. *Bustamante,* 412 U.S. 218 (1973), in their concurring opinions held that federal collateral review of state convictions should be confined solely to the question of whether the petitioner had a fair opportunity to have their Fourth Amendment rights adjudicated in the State courts. Another justice in a concurring opinion refrained from joining in this, as the court's opinion stated it was unnecessary to reconsider *Kaufman* in order to decide the present case.

Reconsideration now appears to be at hand in the case of *Wolf* v. *Rice,* 513 F. 2d 1280, where this Court granted Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit —— U.S. —— 44 L.W. 3010 [March, 1975], docket #75-2019. *Rice* involved a house search and petitioner seeks to have the instant case, involving an automobile, considered as well.

Wolf is analogous to *Whitley,* which was relied on by the Second Circuit Court of Appeals, in that both cases involved a defective warrant but at the *Wolf* suppression hearing the state sustained the validity of the search by relying on facts outside those which were revealed to the issuing magistrate.

2. The Court below erred in not finding Probable Cause for the arrest and search through reliance in *Whitley* v. *Warden of Wyoming Penitentiary*, 401 U.S. 560 (1971).

The supporting affidavit for an arrest warrant in *Whitley* merely set forth that on a certain date the defendants unlawfully broke into a described building. Relying on a radio bulletin describing the two suspects, and the type of car probably being driven, the police stopped an automobile bearing the suspects and a warrantless arrest and search ensued.

This Court, in determining the arrest and search illegal, observed "that the complaint consisted of nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint *id.* 565. The complaint (affidavit) did not mention there was an informant. This Court also rejected the State contention that there was sufficient probable cause outside of the warrant to validly make an arrest and conduct a search.

Here, the arrest and search was without a warrant and while the Second Circuit recognized there was a tip, it found difficulty in supporting the reliability of the unknown source of the tip.

This Court in announcing the two pronged test for probable cause concerning informants, stated the rule, that it must be established that the informant is in fact reliable and the underlying circumstances as to how the informant came by his information must demonstrate sufficient probability of credibility to allow a search or sufficient independent corroboration of the information must be established. *Aguilar* v. *Texas*, 378 U.S. 108 (1965), *Spinelli* v. *United States*, 393 U.S. 410 (1965).

Under the Second Circuit's reasoning, in the instant case, it can never be hoped that "unknown" informants as opposed to "confidential" informants can ever be treated

as generally trustworthy, whereas such events are commonplace.

Here, in the circumstances of an unknown informant, it can be reasonably concluded, as the District Court did, that the tipster was present at the scene and observed the happening of the truck robbery.

It was only a matter of minutes between the Police broadcast and the apprehension. The communication clearly evidences that the robbery was just perpetrated and the perpetrators were in flight. This is not the type of tip borne of suspicion or conclusion as in *Aguilar* but rather, in these fast moving events, the source necessarily had to be at the scene with personal knowledge.

Thereafter, when the arresting officer spotted the automobile matching the radio description there was sufficient independent indicia to furnish reliability of the informant.

There being probable cause to arrest the consequent search was proper under *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

CONCLUSION

Petitioner's application for certiorari should be granted.

Dated: New York, New York November, 1975.

Respectfully submitted,

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State of New York
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Samuel A. Hirshowitz
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 973—September Term, 1974.

(Argued April 30, 1975 Decided July 15, 1975.)

Docket No. 75-2019

UNITED STATES ex rel. THOMAS MUNGO,

Petitioner-Appellant,

—v.—

J. EDWIN LAVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

Before:

MOORE and MANSFIELD, *Circuit Judges,*
and HOLDEN, *District Judge.**

Appeal from order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* denying appellant's application for a writ of habeas corpus.

Reversed and remanded.

DAVID W. MCCARTHY, Esq., MCCARTHY, DORFMAN and BRENNER, Mineola, New York, *for Petitioner-Appellant.*

* Of the United States District Court for the District of Vermont, sitting by designation.

Appendix A.

SAMUEL A. HIRSHOWITZ, First Assistant Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York, on the brief; Burton Herman, Assistant Attorney General, of counsel), *for Respondent-Appellee.*

HOLDEN, *District Judge:*

This is an appeal from the denial of the appellant's application for a writ of habeas corpus by the United States District Court for the Eastern District of New York, Mark A. Costantino, *J.* The decision is reported in 372 F.Supp. 742 (E.D.N.Y. 1974). The application attacks two judgments of conviction entered in the Supreme Court of the State of New York following separate jury trials.

On February 28, 1968, the petitioner was sentenced after his conviction for robbery, grand larceny and assault. The conviction was affirmed by the Appellate Division, Second Department 34 A.D. 2d 736 (without opinion), and by the New York Court of Appeals, 28 N.Y. 2d 540 (without opinion). On March 5, 1968, the appellant was sentenced on his conviction of illegal possession of two weapons, a revolver and a pistol. The second conviction was affirmed without opinion in the Appellate Division, 34 A.D. 2d 616 and by the Court of Appeals, 28 N.Y. 2d 540.[1] Leave to appeal to the Court of Appeals was denied July 1, 1970. Thus, all state remedies had been exhausted by the petitioner prior to filing the petition before us.

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[1] The appellant was sentenced to concurrent terms of 15 to 20 years on the robbery count, 5 to 20 years on the larceny count and 2½ to 10 years on the assault count. The appellant was sentenced for illegal possession to a term of 3 to 14 years, concurrent with the terms of confinement previously imposed.

Appendix A.

Notice of appeal from its denial was filed on July 16, 1974. Application to a different panel for a certificate of probable cause was denied August 16, 1974. On motion for reconsideration, a certificate of probable cause was granted and counsel assigned to prosecute this appeal.

The appellant was arrested and taken into custody on January 14, 1967, by Patrolman Edward Obarowski, New York City Police Department, assisted by Sergeant Linanne, following a police radio communciation that originated from an unknown source. The subject of the radio communication concerns an episode that is unrelated to the offenses that resulted in the state convictions under attack in the present habeas corpus proceedings.

The police broadcast reported the theft of a United Parcel Service truck in the sixty-sixth precinct. A subsequent bulletin reported the vehicle was recovered unoccupied at 875 71st Street. This was followed by a broadcast which stated: "Perpetrators escaped in 6Z7154 New York, blue, four door vehicle, '66 Plymouth." Shortly after Officer Obarowski heard the bulletin, he observed a blue Plymouth sedan with three male occupants, bearing the license plate number 6Z7154. The police officer pursued the vehicle and overtook it while it was halted at a traffic light. He ordered the occupants to vacate the vehicle and immediately placed the black operator and his two white passengers under arrest. The appellant had occupied the driver's seat; one D'Ambra and a third person, identified as Walter Johnson, were the passengers. A search of the persons and the vehicle was conducted. The arresting officer probed with his hand the area underneath the driver's seat and found a revolver. Under the seat on the passenger side another weapon was found. Both guns were loaded.

The police officer removed the three subjects to the sixty-second precinct station. There, on further search, two keys were found in D'Ambra's pocket. A gray fedora hat and

a second hat were found in the vehicle. These items of personal property were received in evidence during the state prosecutions of the appellant Mungo and his co-defendant D'Ambra for the robbery of one Leonard Monteleone, a New York Telephone Company employee, on January 3, 1967. The guns that were seized were used in the trial of the appellant and D'Ambra on the indictment which charged illegal possession of these weapons.

On January 3, 1967, Monteleone had collected money from pay telephones in a factory located at 1301 Gravesend Neck Road. As Monteleone departed from the factory he was confronted by a Negro and a white person who ordered him into the telephone truck. He was ordered to lie down, his hands bound and the money he had collected was stolen, together with the keys he had used to gain access to the coin boxes. The keys found in D'Ambra's pocket on January 14 were identified at the state trial as the keys taken from Monteleone in the robbery of January third. The two hats taken from the vehicle were placed on Mungo and D'Ambra to aid in Monteleone's identification of the accused. The property seized at the time of the arrests was received in evidence over the appellant's unsuccessful motion to suppress.

The appellant challenges both state convictions on the basis that his arrest and the subsequent search of his vehicle were made without probable cause. The robbery conviction is attacked on the ground the station house identification by the complaining witness Monteleone was impermissibly suggestive and the product of the use of property unlawfully seized. We sustain the appellant's contention that the arrest and search by Officer Obarowski were accomplished without probable cause.

The source of the information contained in the police radio communication, which led to the appellant's arrest, remains unknown. In rejecting this aspect of the appellant's claim, Judge Costantino concluded—"(T)he report that the perpetrators were fleeing in a blue sedan bearing a given license plate number was evidently made by a witness at the scene of the crime." The record yields nothing to identify who made the report,—much less the presence of any competent person who observed the theft of the United Parcel Service truck.

The radio bulletin was certainly sufficient to move Officer Obarowski to halt the vehicle in that it carried substantially the same registration number and corresponded to the description given in the police broadcast. While a police radio bulletin may justify immediate investigation, it does not establish probable cause for an arrest and search unless founded on information adequate to support a judicial determination of probable cause. *Whiteley* v. *Warden of Wyoming Penitentiary,* 401 U.S. 560, 568 (1971).[2]

In *Whiteley* the radio bulletin was broadcast on the strength of a warrant that issued without probable cause.

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. *Id.*

That situation prevails here. When the validity of the appellant's arrest was challenged by the appellant's pre-

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[2] Although the appellant's state trials preceded *Whiteley* v. *Warden,* the Supreme Court's decision is applied retrospectively in this Circuit. *Mayer* v. *Moeykens,* 494 F.2d 855, 858 (2d Cir. 1974).

trial motion to suppress, the prosecution was called upon to establish there was probable cause for the arrest of the appellant. *See People* v. *Baldwin,* 25 N.Y. 2d 66, 70 (1970).

Since the arrest in the instant case was made without a warrant, we are confronted with the second question presented in *Whiteley:* whether Officer Obarowski, in arresting Mungo, had independent knowledge sufficient to constitute probable cause within the demands of the Fourth Amendment. Absent a valid warrant, the arresting officer's personal knowledge of facts, sufficient to support a proper magistrate's warrant, will justify an arrest and search incident to the arrest. *Mayer* v. *Moeykens,* 494 F.2d 855, 858 (2d Cir. 1974); *United States* v. *Hall,* 348 F.2d 837, 841 (2d Cir.), *cert. denied,* 382 U.S. 947 (1965).

The total facts within Officer Obarowski's knowledge at the time he effected Mungo's arrest were those reported in the police radio bulletins.[3] The source of the information was unknown at the time of the arrest; it remained

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[3] The radio messages broadcast were as follows:

9:38 a.m. January 14, 1967. From the 66th Precinct, Sergeant Caruso. Received by Patrolman Reilly. 68th Street and Fort Hamilton Parkway. See complainant re: possible larceny of truck. Sergeant Caruso requested car 66 G, which is unavailable and call was given 66D.

• • • • • •

On the rear of the same slip, time stamped 9:56 a.m., January 14, 1967, 7416 United Parcel truck taken in front of 825—71st Street. Received from car 64G, designation 2053, at 10:34.

• • • • • •

Time stamp 10:08 a.m., January 14, '67. From 66th Precinct, Sergeant Caruso. United Parcel truck, dark brown 1939 rocket, New York 145749 commercial. On the side truck number 7146, stolen from 68th Street and Fort Hamil-

(*footnote continued on following page*)

unknown at the time of the pretrial suppression motion.[4] The facts which inspired the radio bulletin were not dis-

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(*footnote continued from preceding page*)

ton Parkway. Direction unknown. Transmitted by radio by operator number 37, Patrolman James McGovern.

• • • • • •

10:10 a.m., January 14, '67. R.N.P. 64G. Recovered at 825—71st Street unoccupied.

• • • • • •

10:13 a.m., January 14, 1967, from car 64A. Perpetrators escaped in 6 Z 7154 New York, blue, four door vehicle, '66 Plymouth. Received by Patrolman James McGovern, assigned to radio.

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10:21 a.m., January 14, '67. Indication '66 Plymouth by operator number 27, Frank Mollo.

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10:35 a.m., January 14, 1967. From R.M.P. 62, Sergeant number 2. Indicates 62B is also on scene. West 8th Street and Avenue U holding occupants of 6Z 7154. Received by operator number 37, Patrolman James McGovern.

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At 10:35 a.m., January 14, '67; 66 detectives, 64 detectives notified. 10:53 a.m., January 14, '67, signal 10383.

[4] Officer Obarowski testified at the suppression hearing:

Q. Officer, in the same paragraph where you have the license plate listed in the complaint I call your attention to the first sentence wherein you state, "A call was made to the 64th Precinct by an unknown person." Is that right?

A. Yes.

Q. So that who originted the call you don't know?

A. No, I don't.

Q. Did you ever learn his identity?

A. No.

Q. Officer, eventually when these defendants were booked in the 64th precinct—withdrawn. In what precinct were the defendants booked?

A. 62nd Precinct.

Q. Eventually when these defendants were booked in the 62nd Precinct they were only charged with crimes involving property that was removed from the automobile, or the persons as a result of the search; is that right?

A. Correct.

Mr. Kranz: I have no other questions at this time, your Honor.

closed in the record of the state proceedings, nor have they been advanced in the present collateral federal action.

In denying the appellant's application Judge Costantino placed principal reliance on *Chambers* v. *Maroney,* 399 U.S. 42 (1970) to conclude that ". . . the evidence proffered before the trial court supports its finding that the arresting officer had probable cause to believe that the occupants of the blue sedan had committed a felony. The events leading up to the arrest occurred within a short time of the robbery. The report that the perpetrators were fleeing in a blue sedan bearing a given license plate number was evidently made by a witness at the scene of the crime. When Patrolman Obarowski observed a car fitting the description immediate action was necessary. In such exigent circumstances the arrests were proper. *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Warden* v. *Hayden,* 387 U.S. 294 (1967); *United States* v. *Wabnik,* 444 F.2d 203 (2d Cir. 1971). Moreover, the same circumstances which justified the arrests also furnished probable cause for the search of the automobile, *Chambers* v. *Maroney, supra* at 46-47; or in the alternative the search was valid as an incident to the lawful arrest. *Chambers* v. *Maroney, supra.*"

The trial court's conclusion, that the report (to the police) was evidently made by a witness at the scene of the crime, is entirely unsupported by the record. Indeed, apart from the radio bulletin itself and its reference to a truck stolen from 68th Street and Fort Hamilton Parkway, there is nothing to establish that an actual theft had taken place.

In the presence of these shortages, it is clear the District Court's reliance on *Chambers* v. *Maroney* is misplaced. Mr. Justice White's opinion in *Chambers* stresses the point that the police acted on information supplied by the victim and two teen age observers at or near the

scene of the crime. In reliance on this information, the Court held the police had ample cause to stop and arrest the occupants whose description, and that of their getaway car, fitted the identification provided by the eyewitnesses to the crime.

The state urges that there was probable cause for arresting the appellant since he fitted the description of a perpetrator as stated in a radio alarm. We are referred to *United States ex rel. Wilson* v. *LaVallee,* 251 F.Supp. 292, 296 (N.D.N.Y. 1966), *aff'd* 367 F.2d 351 (2d Cir. 1966) and *United States ex rel. Williams* v. *LaVallee,* 415 F.2d 643, 645 (2d Cir. 1969).

In the *Williams* case the contraband contained in the proverbial "brown paper bag" was discovered in plain view as the officers ordered the occupants from the vehicle that corresponded to the description given in the police bulletin. The vehicle was halted on the predicatable escape route after it had failed to stop immediately as directed. The occupants of the Williams vehicle were observed to be armed as the officers approached the car. It is significant that before making the arrest, the officers requested additional identifying information concerning the subjects of the police alarm. The occupants met the description supplied in the second bulletin. Apart from these distinctions, both cases were decided without the benefit of the light of *Whiteley* v. *Warden, supra.*

As previously indicated, in the case at hand the information possessed by Officer Obarowski and the officer who accompanied him, consisted only of the data contained in the police bulletin, coupled with the fact that the vehicle substantially fitted the description given in the broadcast. These factors are fewer in number and less persuasive than those available to the arresting officer in *Whiteley,* which were held to be insufficient in substance to establish

probable cause for a warrantless arrest.[5] The record is barren of any facts available to the police concerning the source of the complaint received by Patrolman Reilly at 9:30 "re possible larceny of truck." There is nothing to corroborate the information that the panel truck was actually stolen and that if there were such a theft, that it was probably committed by the occupants of the blue Plymouth which was seized and searched. Although the arresting officers acted with commendable dispatch and vigilance in response to the bulletin, the arrest was made without probable cause and invaded the appellant's constitutional rights under the Fourth and Fourteenth Amendments. And the evidence obtained as an incident to the arrest should have been suppressed and excluded. *Whiteley* v. *Warden of Wyoming State Penitentiary, supra,* 401 U.S. at 566-568; *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

The defendant seeks to rescue both the arrest and the search on the contention that the radio bulletin justified the investigatory stop of the Mungo vehicle. It is argued that in the course of the investigation which followed, Officer Obarowski had authority to reach underneath the car seat to uncover the loaded weapons. This discovery supplied probable cause to make the arrest and search that followed, since there was no infringement on the right of privacy once the occupants had vacated the vehicle.

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[5] In *Whiteley* the information possessed by the Laramie police officer at the time of the arrest and search consisted of (1) the data contained in the police bulletin; (2) the knowledge obtained by personal observation, that the two men were driving a car matching the car described in the radio bulletins; (3) the knowledge possessed by one of the arresting officers, that one of the people in the car was Jack Daley; (4) the knowledge acquired by personal observation, that the other individuals in the car fitted the description of Whiteley contained in the police bulletin; and (5) the knowledge acquired by the officer after stopping Whiteley, that he had given a false name. 401 U.S. at 566, 567.

In urging this point, the appellee relies on *Cardwell* v. *Lewis,* 417 U.S. 583 (1974). Early in the opinion of the majority of the Court, Mr. Justice Blackmun carefully limits the scope of its teaching to the exterior of the vehicle and points out:

> This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that implicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the exterior and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect. This is an issue this Court has not previously addressed. *Id.* at 588.

The Court then went on to hold:

> In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861, 865 (1974). Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.

Appendix A.

We recognize that the constitutional demands for a permissible search of a mobile vehicle are less stringent than those which obtain in the search of private premises. *See Chambers* v. *Maroney, supra,* 399 U.S. at 48. But the officers conducting the search must have reasonable or probable cause to believe they will find the instrumentality of a crime or evidence pertaining to a crime before the warrantless search is undertaken. *Dyke* v. *Taylor Implement Manufacturing Co.,* 391 U.S. 216 (1968). As we have seen, probable cause was not supplied to the investigating officers from the facts stated in the police broadcast. "(I)nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry." *Cardwell* v. *Lewis, supra,* 417 U.S. at 591. While the right to privacy does not protect the exterior of the vehicle, it does extend to a gun concealed under the seat of the vehicle. Since the evidence given at the suppression hearing was insufficient to justify the interior search of the vehicle, it should have been excluded at the trial. *Dyke* v. *Taylor Implement Manufacturing Co., supra,* at 221.

The appellant's hat, taken in the course of the search of his automobile on January 14, 1967, served another purpose of the prosecution before trial. When the witness Monteleone was called to the precinct house to identify the appellant and D'Ambra, he viewed them along with a second white suspect, considerably older than either Mungo, who was black, or his co-defendant D'Ambra. Monteleone was unable to identify any of the suspects until the police placed hats on Mungo and D'Ambra. The hat placed on Mungo's head was taken from his vehicle at the time of his arrest.

The same considerations which prohibited the use of the products of the search as evidence, forbade its use in the

Appendix A.

police station identification.[6] "The exclusionary prohibition extends as well to the indirect as the direct products of such invasion." *Wong Sun* v. *United States,* 371 U.S. 471, 484 (1963).[7]

Although written in a different factual context, the policy upon which the rule is founded was stated by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evi-

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[6] The testimony of Mr. Monteleone at the pretrial hearing on the defendant's motion to suppress the identification established that the utilization of the hats quickened his memory. Prior to their use, he had been unable to make a positive identification:

A. First they were showed without the hats, and then with the hats.
Q. All right. And isn't it a fact when you first saw them you said you weren't sure? What? Isn't that right?
A. Yes. . . .
Q. But you weren't sure when you first looked at them; isn't that right?
A. Without the hats on.
Q. And then they put hats on?
A. Yes; and glasses.
Q. Oh; he put glasses on them too?
A. On the white fellow; the white fellow.
Q. What kind of hats did he put on them?
A. He put a gray fedora on the white defendant and a black sort of state trooper type hat on the Negro fellow; the Negro defendant. . . .
Q. Didn't you tell him you weren't sure of the Negro fellow?
A. Before he—before the hat was put on him.
Q. You said you weren't sure.
A. Right.

[7] The authority of *Wong Sun* has recently been reaffirmed by the U.S. Supreme Court in *Brown* v. *Illinois,* 43 U.S.L.W. 4937 (U.S. June 26, 1975).

dence so acquired shall not be used before the Court but that it shall not be used at all.

See United States v. *Edmons,* 432 F.2d 577 (2d Cir. 1970).

This result makes it unnecessary to decide the appellant's remaining contention that the station house identification by the witness Monteleone was impermissibly suggestive and unreliable within the due process concept expressed in *Neil* v. *Biggers,* 409 U.S. 188 (1972).

The order of the District Court is reversed and the cause is remanded with direction to grant the appellant's application for a writ of habeas corpus unless the State of New York, within a reasonable time after the date of this mandate, takes proper steps to retry the appellant on such counts of the indictment as the people shall deem appropriate.

APPENDIX B

Decision of United States Court of Appeals for the Second Circuit.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-395

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA *ex rel.* THOMAS MUNGO,

v.

J. E. LaVALLEE, Superintendent of Clinton Correctional Facility, Box B, Dannemora, N.Y. 12929.

Submitted:

McCARTHY & DORFMAN, Esqs., by David W. McCarthy, Esq., 1527 Franklin Avenue, Mineola, New York, for relator

Hon. LOUIS J. LEFKOWITZ, Attorney General, State of New York, by Burton Herman, Ass't Attorney General, for respondent

COSTANTINO, D.J.

Thomas Mungo, presently confined at Clinton Correctional Facility, moves for a writ of habeas corpus under 28 U.S.C. § 2254 (1971), attacking a conviction for robbery, grand larceny and assault following a jury trial in Supreme Court, Kings County. Specifically he claims that the trial judge committed error by admitting testimony

Appendix B.

of an out-of-court identification which was the product of an impermissibly suggestive confrontation and by admitting into evidence items illegally seized from his automobile at the time of his arrest.

Prior to trial, relator was afforded a full evidentiary hearing on his motion to suppress the identification testimony and the items seized from the automobile. The facts adduced at the hearing can be summarized as follows. On January 3, 1967 Leonard Monteleone, then an employee of the New York Telephone Company, was collecting coins from pay telephones. At about 2:30 p.m. he proceeded to a factory located at 1301 Gravesend Road, Brooklyn, New York. Upon leaving the factory with two coin cannisters he pushed a door against a man standing outside, whereupon he turned to the individual and excused himself. Before he reached his vehicle he observed that same person—later identified as Thomas Mungo—come up to his right and he felt something hard being placed into his side. He was told, "Don't say anything. Get into the truck." While entering the rear of the truck Monteleone turned his head and observed a second man follow behind him—this man was later identified as Robert D'Ambra. After being asked for his keys, he was bound by tape and made to lie face down on the floor of the truck. The vehicle was then driven away and shortly thereafter several coin cannisters were removed.

At the hearing Monteleone testified that he was able to see the face of each of the assailants for a few seconds. Moreover, on the day of the robbery he was able to give to the police a description of the clothing worn by the robbers, their race, approximate age and build. The following day he was able to assist a police artist in constructing a fairly accurate portrait of D'Ambra. He was unable to describe Mungo's facial characteristics, although he later testified that at the time he had a "picture of him in his mind."

Appendix B.

Eleven days after the robbery Monteleone was summoned to the 62nd Precinct in Brooklyn "to see if he could identify two people." At the stationhouse he was requested to observe three men in a line-up—two of whom were white, D'Ambra and another man much heavier and older than him, and Mungo who was black. Initially Monteleone stated that though two of the men resmbled the robbers he could not definitely identify them. The police then placed hats and other apparel on D'Ambra and Mungo. It is significant that the hats and apparel were similar to those which Monteleone had previously described as being worn by the robbers. An identification of Mungo and D'Ambra was then made. On later occasions Monteleone was unable to make a positive identification of either man. At both the hearing and trial he maintained that when he identified them he was certain that they were the men who had robbed him, but that since he had seen them several times thereafter he could no longer make an identification on the basis of his observations of January 3, 1967.

Minutes after the robbery Patrolman Edward Obarowski heard a bulletin over his police-car radio announcing that "in connection with a high-jacking of a United Parcel Service truck in the 66th Precinct, the perpetrators (three men) were supposedly leaving the scene in a 1966 Plymouth, color blue, registration 6Z 7514." The broadcast also reported that the truck had been left near 71st Street and Fort Hamilton Parkway. Shortly thereafter the patrolman observed a blue Plymouth sedan with three men inside and which bore the license plate numbers given in the bulletin. He pursued the vehicle and while it was stopped for a traffic light ordered the occupants out of the car. All three occupants were placed under arrest and a search was conducted of their persons and the automobile. Under the front seat of the car the patrolman found weapons and hats which corresponded to those described by Monteleone and

which were subsequently admitted into evidence against the defendants.

At the conclusion of the hearing the trial court denied the motions to suppress the identification testimony and the items seized by the arresting officer. Essentially the court held that despite the suggestiveness of the pretrial line-up, Monteleone's identification was reliable. The court's ruling was based upon Monteleone's opportunity to observe his assailants, the short interval between the robbery and the confrontation, the certainty expressed by the witness at that time, and the reasonably accurate description of the robbers given to the police—especially the police artist's drawing. The court made particular reference to the witness' honesty in admitting that after eleven months and after having seen the defendant on several occasions he could not be sure of his identification. With respect to the weapons and other items taken from the automobile, the court held that their seizure was incident to a lawful arrest. The court found that the arresting officer had sufficient information to give rise to a reasonable belief that the occupants of the car had committed a felony and were in flight, which thereby justified the arrest and search of the vehicle.

Since the out-of-court identification occurred prior to the rulings in *Gilbert* v. *California,* 388 U.S. 263 (1967) and *United States* v. *Wade,* 388 U.S. 218 (1967), relator's due process claim is to be determined in accordance with the principles established in *Stovall* v. *Denno,* 388 U.S. 293 (1967), and its progeny. In *Neil* v. *Biggers,* 409 U.S. 188 (1972), the Supreme Court restated the governing test as follows:

> It is, first of all, apparent that the primary evil to be avoided is a "very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U.S., at 384. While the phrase was coined

> as a standard for determinning whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . .

Id. at 198. The Court further held that mere proof of unnecessary suggestiveness did not require exclusion of evidence of an out-of-court identification. Rather the pivotal question to be resolved is

> whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. . . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199. The record amply supports the state court's finding that the out-of-court identification was reliable. The witness clearly had a basis of recognition independent of the tainted confrontation. *Neil* v. *Biggers, supra; United States ex rel. Phipps* v. *Follette,* 428 F.2d 912 (2d Cir. 1970).

Turning to relator's claim that he was unlawfully arrested, the evidence proffered before the trial court supports its finding that the arresting officer had probable cause to believe that the occupants of the blue sedan had committed a felony. The events leading up to the arrest

occurred within a short time of the robbery. The report that the prepetrators were fleeing in a blue sedan bearing a given license plate number was evidently made by a witness at the scene of the crime. When Patrolman Obarowski observed a car fitting that description immediate action was necessary. In such exigent circumstances the arrests were proper. *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Warden* v. *Hayden,* 387 U.S. 294 (1967); *United States* v. *Wabnik,* 444 F.2d 203 (2d Cir. 1971). Moreover, the same circumstances which justified the arrests also furnished probable cause for the search of the automobile, *Chambers* v. *Maroney, supra* at 46-47; or in the alternative the search was valid as an incident to the lawful arrest. *Chambers* v. *Maroney, supra.*

Accordingly, the application for a writ of habeas corpus is denied. 28 U.S.C. § 2254(d) (1971).

NICHOLAS COSTANTINO
U. S. D. J.